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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RODERICK MARKHAM, Defendant and Appellant.	E045986 (Super.Ct.No. SWF024303) **OPINION**

APPEAL from the Superior Court of Riverside County. Sherrill A. Ellsworth, Judge. Affirmed in part as modified and reversed in part with directions.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Chandra E. Appell, Deputy Attorneys General, for Plaintiff and Respondent.

The twin daughters of defendant Roderick Markham's girlfriend testified that, when they were 13 years of age or younger, defendant raped them repeatedly. As a result, defendant was found guilty on five counts of aggravated sexual assault on a child. (Pen. Code, § 269, subd. (a)(1).) A "one strike" multiple-victim special circumstance was found true. (Pen. Code, § 667.61, subd. (e)(5).) Three "strike" priors were also found true. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) The trial court sentenced defendant to a total of 235 years to life in prison.

Defendant contends:

1. The trial court erred by admitting evidence of defendant's gang membership.

2. The trial court gave an erroneously worded unanimity instruction.

3. The trial court erred in imposing three particular fines and one order for payment of costs.

We agree that the trial court erred by overruling defendant's objection to evidence of his gang membership. However, under the circumstances of this case — among other things, the jury heard evidence that defendant had a total of *eleven* prior convictions for aggravated assault and robbery; also it had already heard some unobjected-to evidence of defendant's gang membership — we conclude that the error was not prejudicial.

The People concede that the amount of one of the challenged fines was excessive. They also concede that the challenged order for payment of costs was erroneous.

We find no other error. We will modify the judgment so as to correct the excessive fine. We will also remand with directions to reconsider the order for payment of costs. In all other respects, we will affirm the judgment.

I

FACTUAL BACKGROUND

A. *Prosecution Evidence.*

Defendant lived with Sylvia M. "[o]ff and on" and had a daughter with her. Sylvia M. also had seven other children, including nonidentical twin daughters born in 1993, known in this case as Jane Doe 1 (Doe 1) and Jane Doe 2 (Doe 2). Doe 1 and Doe 2 regarded defendant as their stepfather.

Doe 1 was mentally retarded; she was in special education classes. She had problems with dates and times.

Around 2005, the family moved to a different residence in Hemet. Sometime after the move, defendant began having sexual intercourse with Doe 1 against her will.

Doe 1 testified that defendant had sex with her only twice. However, she also testified that he had sex with her exactly three times. Ultimately, she described what could be viewed as at least six such incidents.

In one incident, defendant grabbed Doe 1 by the shirt, dragged her into her mother's bedroom, took off her clothes, and had sexual intercourse with her. She tried to push him off, but he held her hands. She told him to let her go and to stop. She tried to

yell, but he put his hand over her mouth. She testified, "He said if I told my mom that he was going to kill her." [1]

In another incident, defendant entered the bedroom that Doe 1 and Doe 2 shared. Both girls were there, sleeping.[2] Defendant took off Doe 1's pajamas, then had sexual intercourse with her.[3] She told him no; she also yelled for help. When Doe 2 awoke and tried to push him off Doe 1, he desisted.[4] Once again, Doe 1 did not tell because she was afraid of defendant.

In a third incident, defendant put Doe 1 on the sink in the bathroom, then had sexual intercourse with her. She said, "No, stop it," and tried to push him away. He stopped when Doe 2 knocked on the door.[5]

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[1] On direct examination, Doe 1 testified that Doe 2 was "[i]n the front room" during this incident and knew nothing about it. On cross-examination, however, she testified that Doe 2 came into the bedroom and helped her push defendant off.

[2] On direct, Doe 1 testified that defendant "jumped on" her, "smother[ing]" her with his chest, and she passed out; when she came to, he was taking off her clothes. On cross, however, she simply testified that he grabbed her arm, pushed her down on the bed, and took off her clothes.

[3] On cross, Doe 1 testified that defendant touched her breasts on the outside of her pajamas but did not take off her pajamas, touch her private parts, or have intercourse with her.

[4] Doe 2 confirmed that she once saw defendant on top of Doe 1 and tried to "[p]ull him off of her."

[5] On cross, Doe 1's testimony about this bathroom incident became hopelessly confused.

Defense counsel began by asking her about the "time . . . in the bathroom." In response, she described an incident in which defendant dragged her "halfway" out of her bedroom and toward the bathroom but was thwarted when Doe 2 pulled her back into the bedroom.

[footnote continued on next page]

In a fourth incident, Doe 1 and her mother were sleeping in the same bed when defendant came in, took Doe 1's clothes off, and started having sexual intercourse with her. She told him to stop, but he did not. He stopped either when her mother "felt the bed shaking," when her mother got up to go to the bathroom, or when her mother came back from the bathroom.

Doe 1 also testified to a fifth incident (although this may have been just a different version of the first incident). On that occasion, defendant grabbed Doe 1 by the shirt, threw her onto the bed in her older sister's bedroom, pulled her pants down, and had sexual intercourse with her. He stopped after she "kicked him off."

In addition, Doe told police about a sixth incident (which may have been just a different version of the second incident). This time, she was in her bedroom when

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[footnote continued from previous page]

Defense counsel understandably tried to establish that defendant had not actually taken her into the bathroom. She then responded that, "[t]he same night," defendant did "take [her] to the bathroom." As she then described this incident, however, defendant came into the bedroom, brandished a knife, and demanded to see the twins' breasts; instead, they told him to get out, and he left.

Accordingly, defense counsel tried yet again to establish that defendant had not actually taken her into the bathroom. She responded, "He took me to the bathroom," but on "[a] different night." She then described an incident in which he took her to the bathroom; however, she fought him off, and he did not touch her private parts.

At first, Doe 1 stated that, when this bathroom incident began, she was "[i]n [her] mom's room." However, she then said that, when it began, she was "[i]n the living room." Similarly, she said, "He took off my clothes," but then said, "[H]e didn't get [my] clothes off[.]"

defendant came in and said, "Let me stick it in you[.]" He then pulled down her shorts and had sexual intercourse with her.

Meanwhile, Sylvia M.'s uncle, Jerry M. (Uncle Jerry), visited the family often and sometimes stayed with them. Sylvia M. admitted knowing that Uncle Jerry was a registered sex offender who had been convicted of raping an adult victim. Doe 1 testified that, during this same time period, Uncle Jerry was also "doing bad things" to her.

At trial, Doe 2 testified that defendant had sexual intercourse with her, too, against her will. She described three specific incidents,[6] while adding that defendant also did "the same thing" on other occasions.

The first time was when Doe 2 was 13 — i.e., in 2006 or 2007. She was in the bathroom. Defendant came in, sat her on the counter, and had sexual intercourse with her.[7] Doe 2 tried to stop him by "[p]ulling him back." She did not tell anyone because she was "scared" that defendant would "do something," such as hit her. However, she admitted that defendant never threatened her.

Some days later, Doe 1 and Doe 2 were sleeping in the same bed when defendant got into bed with them, pulled down Doe 2's pants, and had sexual intercourse with her. She kept "[t]elling him to get off."

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[6] Doe 2 also testified to one incident of attempted rape and one incident in which defendant threatened to stab her unless she showed him her breasts.

[7] Doe 1 confirmmed that she once saw defendant drag Doe 2 into the bathroom, then close the door.

Another time, in 2007, on a weekend, Doe 2 was home alone when defendant came into her bedroom, took her clothes off, and had sexual intercourse with her. She was afraid. She told him to get off and tried to make him get off by pushing him. She did not tell her mother because she was scared that defendant might do something to her mother.

Around May 1, 2007, Sylvia M. made defendant move out.[8] On the night of May 8-9, 2007,[9] Doe 1 disclosed to Sylvia M. that defendant had been having sex with her. Later in the conversation, she disclosed that Uncle Jerry had also been having sex with her. According to both Sylvia M. and Doe 2, Doe 2 then revealed that both defendant and Uncle Jerry had been having sex with her, too.

Sylvia M. immediately called the police. When the police initially questioned Doe 1, she told them about three incidents — one when she was in her mother's bed, one when she was in her own bedroom, and one when she was in the bathroom.

Sylvia M. and Doe 2 testified that they told the police that defendant had also had sex with Doe 2. According to the responding officer, however, Sylvia M. never mentioned more than one victim. He interviewed Doe 2, but she told him that "nothing's

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[8] Doe 1 testified that, after defendant moved out, he would "sneak[] in the house" when Sylvia M. was at the store. Defense counsel asked when this occurred; she said, "I don't know." When asked if it happened last week, she agreed; when asked if it happened a couple of weeks ago, she agreed. She testified that it happened most recently before her daughter was born (i.e., over a year earlier); however, she also testified that, at the time, her daughter was at the store with Sylvia M..

[9] At the time, the twins were still 13.

ever happened to her." Neither of the twins mentioned that Doe 2 had been present at any time when defendant had sex with Doe 1.

A sexual assault examination of Doe 1 revealed that she was eight and a half months pregnant. In June 2007, Doe 1 gave birth to a daughter. DNA testing revealed that the father was Uncle Jerry. A sexual assault examination of Doe 2 failed to show one way or the other whether she had ever had intercourse.

When defendant heard "what happened," he phoned Sylvia M. and said, "I'll kill you, bitch." (Hyphenation and capitalization omitted.) However, he also said, "Why are you trying to pin this shit on me[?]" He said "[T]he truth would come out," and added, "After the fucking DNA test, you'll see I ain't the baby's daddy."

In July 2007, defendant was arrested, in Compton; Detective Donald Brokaw drove him back to Hemet. During the drive, defendant denied any sexual conduct with the twins.

Once back at the police station, Detective Brokaw interviewed defendant. He told defendant (falsely) that DNA tests had already shown that he was the father of Doe 1's child,[10] so the only question was whether the sex had been consensual or forcible. Defendant insisted, "It never happened."

Detective Brokaw continued to suggest that the sex had been consensual: "Being charged with . . . sexual penetration with force, which is the $1,000,000.00 bail, that's the

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[10] Defendant admitted knowing, however, that "some officers lie" during interrogations.

one that's really screwing you. . . . You're gonna have a hard time . . . say[ing] that . . . you're being charged with like a forceful sexual act on a minor, versus what I was told from Jerry, more of a consensual, these girls were very sexualized."

Detective Brokaw then argued that "there's this brand new baby that[] somebody's gotta step up and be responsible for . . . ." He added: " . . . CPS is waitin' for my investigation to be done. Is it something where you can step up and be the dad and I can tell people, hey, let him raise the child?" Defendant replied, "How I'm gonna raise a child in jail?"

Finally, Detective Brokaw suggested again that the twins had been "provocative," adding that "[h]ow much trouble you're gonna be in" would depend on whether the sex was consensual; he concluded, "I got . . . CPS wanting to know what we're gonna do with this kid . . . ."

At this point, defendant said, "Ok. Let's say (sigh) it was consensual sex. Yes they are provocative, ok. . . . Let's say I want to raise my child. I'm still going to jail[,] right?"

Detective Brokaw replied, "You're in trouble[,] yes. But how much trouble . . . . [N]obody wants dad away from kid, jails are all full . . . ." "We need to get you some counseling, we need to get you in job training, we gotta get you some kind of parenting classes."

The interview ended with this exchange:

"[DET. BROKAW]: Ok. what do I tell CPS[,] then?

"MARKHAM: You're gonna tell CPS that child's mine if I'm raising it.

"[DET. BROKAW]: You'll raise it? You gonna take responsibility?

"MARKHAM: Yep."

Detective Brokaw asked again if the sex had been consensual, and defendant requested an attorney.

B. *Defense Evidence*.

Defendant testified in his own behalf. He was impeached with three prior convictions for robbery and eight prior convictions for aggravated assault.

Defendant testified that in 2004, Sylvia M.'s adult son found Uncle Jerry in bed with Doe 2 and beat him up. Sylvia M. then admitted to defendant that Uncle Jerry was a registered sex offender.

When a neighbor posted flyers revealing that he was a registered sex offender, Uncle Jerry moved; Sylvia M. and her family moved to second residence in Hemet to stay near him. Over defendant's objections, Sylvia M. began allowing Uncle Jerry back in the house. Uncle Jerry bought vehicles for Sylvia M. and her children. He also bought presents for the twins, such as "cell phones [and] leather tennis shoes . . . ."

Defendant became concerned that Uncle Jerry was molesting the twins. When Doe 1 started to show, defendant told Sylvia M. that she was pregnant, but Sylvia M. insisted that she was just fat. Around May 1, 2007, after an argument with Sylvia M. over Uncle Jerry, defendant moved out. He started living in his car, in Compton. Because he was leaving Hemet, he quit his job. He told Sylvia M. that he was going to seek custody

of his daughter. (At trial, he testified that he believed Sylvia M. had accused him of raping the twins to prevent him from gaining custody of his daughter.)

At some point, defendant's sister told him that Sylvia M. had accused him of raping the twins. Defendant phoned Sylvia M.; he told her that Uncle Jerry was the father of Doe 1's baby, that "DNA would prove [his] innocence," and that he was going to see that she was charged with child endangerment and "aiding and abetting."

Defendant admitted having "a drug problem." While in Compton, he started doing drugs again. In July 2007, he was arrested for trespassing in an abandoned building. He was high on crack cocaine at the time.

According to defendant, when Detective Brokaw questioned him, he had been in custody for over eight hours, during which he had not been allowed to have food or water or to go to the bathroom. He was "exhausted"; he kept falling asleep, but the police kept waking him. He nevertheless consistently denied having sex with either of the twins. He denied making the statement — heard on the tape of Detective Brokaw's interview — "Let's say it was consensual." When asked, "So is that somebody else's voice?," he answered, "I would have to say yes."

II

EVIDENCE OF DEFENDANT'S GANG MEMBERSHIP

Defendant contends that the trial court erred by admitting evidence of his gang membership.

A. *Additional Factual and Procedural Background.*

Before defendant was called to testify, the trial court ruled that he could be impeached with his three prior convictions for robbery and eight prior convictions for aggravated assault. The prosecutor then indicated that she also intended to ask defendant about his gang membership. Defense counsel objected that the evidence was irrelevant; he argued that defendant had not been a gang member since "his teens."

The trial court ruled that the evidence was admissible, though it added, "You can ask . . . if he was in gangs then, what kind of gangs they were, when that occurred, but there is a limit to — this is not about gangs. . . . It surely can be very prejudicial. The idea that he at least once belonged to a gang is somewhat probative as to the nature of behaviors and his lifestyle, but we're not going to spend a long time on that, so we'll go side bar so I would limit it."

On direct, therefore, defense counsel elicited the fact that defendant had been a gang member. Defendant testified that, when he was 13, he had become involved in the Piru gang, a street gang in Compton affiliated with the Bloods. He explained, "You had to be part of a gang to survive in Compton." After being a member for 15 or 16 years, he left the gang because he was "tired of the mess and the politics, and [he] wanted to make a change."

On cross-examination, the prosecutor asked:

"Q. Okay, so isn't it true, though, Mr. Markham, that you would actually have to be jumped out of a gang?

"A. No, that's TV.

"Q. Okay, so in real-life gangs in Compton that's not something that happens?

"A. No.

"Q. Okay. You could just walk away at any time?

"A. Any time.

"Q. Okay, but you chose to continue being a member of this gang for 16 years because that was the lifestyle that you chose?

"A. Yes.

"Q. Okay, but you were still committing crimes after you were out of the gang, then; is that right?

"A. Yes."

In closing, the prosecutor concluded as follows: "[H]e is a violent criminal and he has no respect for human beings. He just didn't care. In the way that he talked to them, in the way he took off when (Jane Doe 1) was pregnant, in the way that he's out being a gang banger on the streets hurting people, that's the true person that he is. And he can come in here and say everything that he wants but when you look at who he really is, he's a violent gangster who has absolutely no respect for any human being in our community including his own stepdaughters. And that's the kind of lifestyle that he'll lead, that's the kind of lifestyle that he has led and that's the kind of lifestyle that led him to do what he did to these little girls. Please don't be fooled. That man is a rapist."

B. *Analysis.*

"California courts have long recognized the potential prejudicial effect of gang evidence. As a result, our Supreme Court has condemned the introduction of such evidence 'if only tangentially relevant, given its highly inflammatory impact.' [Citation.] Because gang evidence creates a risk that the jury will infer that the defendant has a criminal disposition and is therefore guilty of the charged offense, 'trial courts should carefully scrutinize such evidence before admitting it.' [Citation.] [¶] Nonetheless, evidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. [Citations.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.)

We are at a loss to perceive any relevance that defendant's gang membership had in this case. The trial court ruled that it was relevant to "the nature of [his] behaviors and his lifestyle . . . ." The charged sexual offenses, however, were in no way gang related. If the trial court meant that gang members are more likely to commit sexual offenses, or even to commit crimes in general, its ruling fell afoul of Evidence Code section 1101, subdivision (a).

The People suggest that the evidence was relevant to impeach defendant. They do not explain, however, how it had a tendency to do that. It could be argued that gang membership is admissible to impeach a witness because it shows general moral turpitude. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.) Even if so, "courts may and

should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Id*. at pp. 296-297, fn. omitted.) Inasmuch as defendant was already being impeached with 11 prior violent felony convictions, it was an abuse of discretion to allow him to be additionally impeached with the marginally probative but highly prejudicial fact of his gang membership.

An objection based on Evidence Code section 352 has been preserved for appeal. Defense counsel objected, in part, that the evidence was irrelevant; however, he also objected that defendant's gang membership was remote, thus at least implicitly invoking Evidence Code section 352. In any event, as the People concede, the trial court indicated that it had in fact weighed the probative value of the evidence against its potential for prejudice. Thus, it basically also ruled that the evidence was admissible under Evidence Code section 352. Any more specific objection on this ground would have been futile.

We turn, then, to whether the error is reversible. "The erroneous admission of gang or other evidence requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been excluded. [Citations.]" (*People v. Avitia* (2005) 127 Cal.App.4th 185, 194.) We recognize that gang evidence is inherently prejudicial; nevertheless, several factors indicate that its potential prejudicial effect was not realized in this case.

First, the jury knew that defendant had 11 prior violent felony convictions. Earlier, we reasoned that, in light of defendant's criminal history, the prosecution did not really

need to introduce evidence of his gang membership. For the same reason, however, evidence of his gang membership was unlikely to worsen whatever views that the jurors had already formed about him.

Second, in light of the trial court's ruling, defense counsel wisely elected to minimize the impact of the gang evidence as much as possible. Thus, on direct, defendant testified that he had been very young when he chose to join a gang; that he did so as a matter of survival; and that, after he grew up, he left the gang of his own accord. On cross, to counter this, the prosecution brought out the fact that defendant continued committing crimes even after he left the gang. However, this only confirms our previous point — that defendant's gang membership had little independent probative value or prejudicial effect in light of his criminal history.

Third, even before defendant took the stand, there had already been some mention of the fact that he was a gang member. During the direct examination of Sylvia M., she testified:

"Q. . . . [A]fter [defendant] left and before you confronted (Jane Doe 1) about being pregnant, were you still having contact with him?

"A. He called once because he seen one of my kids' dad and he called — he called — *when he was a gang member*, they have their little picnics and stuff. He called, and he just said, oh, yeah, I saw your baby dad, and I hung up the phone." (Italics added.)

Similarly, in his interview of defendant, which was played for the jury, Detective Brokaw stated: "So lying about this puts you deeper in the corner, you're really

caught . . . . Now are you going to go back to *your old ways of being the gang bang* and lying . . . ?" (Italics added.)

Fourth and finally, the jury was effectively instructed to consider defendant's gang membership solely as evidence of his credibility and thus not as evidence that he was a "bad guy" in general. The jury was given Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 316, which stated, as relevant here: "If you find that a witness has committed a crime *or other misconduct*, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable." (Italics added.) And, once again, particularly when considered solely as evidence of defendant's credibility, defendant's gang membership faded into the background of his criminal history.

Admittedly, the prosecutor did use defendant's gang membership in closing argument. Essentially, she argued that, because he was "a violent criminal" as well as a "a violent gangster," he had "the kind of lifestyle" that "led him" to be "a rapist." Defense counsel could and should have objected to this argument based on Evidence Code section 1101, subdivision (a), as well as CALCRIM No. 316. By failing to do so, he forfeited any appellate argument that the prosecutor's closing argument increased the possibility of prejudice to defendant. In any event, once again, we do not believe the

prosecutor's reference to defendant's gang membership was prejudicial above and beyond her reference to his criminal history.

Defendant relies on *People v. Avitia, supra,* 127 Cal.App.4th 185, which held that evidence of gang graffiti found in the defendant's room was prejudicial. (*Id*. at pp. 194-195.) There, however, the only evidence of the defendant's criminal history consisted of two misdemeanor convictions, both on the same date, for carrying a concealed firearm (Pen. Code, § 12025) and for carrying a loaded firearm (Pen. Code, § 12031). Moreover, the jury was instructed to consider these prior convictions solely with respect to the defendant's guilt on one of the three counts, unlawful possession of a firearm (Pen. Code, § 12021, subd. (c)(1)). (*Avitia*, at p. 190.) Thus, unlike in this case, the gang evidence had a significant tendency, over and above the defendant's criminal history, to inflame the jury. Also, in *Avitia*, defense counsel did nothing to minimize the impact of the gang evidence. Significantly, the defendant's gang membership had not already been leaked to the jury in other testimony. And finally, there is no indication in the opinion that the jury was given any limiting instruction regarding the gang evidence.

Defendant argues that we should apply the federal constitutional standard of harmless error (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705]) because the error violated due process. Not so. "[T]he admission of evidence, even if error under state law, violates due process only if it makes the trial fundamentally unfair." (*People v. Partida* (2005) 37 Cal.4th 428, 436; see also *id*. at p. 439.) For all the reasons we have already discussed in holding that it is not reasonably

probable that the error affected the jury's verdict, we further conclude that the error did not render the trial fundamentally unfair.

In sum, then, the trial court's error in admitting evidence of defendant's gang membership was harmless and not reversible.

III

THE WORDING OF THE UNANIMITY INSTRUCTION

Defendant contends that the trial court gave an erroneously worded unanimity instruction.

A. *Additional Factual and Procedural Background.*

Defendant was charged with five counts of aggravated sexual assault on a child by means of forcible rape, each allegedly committed "on or about 2004, through and including 2007." In counts 1 through 3, the alleged victim was Doe 1; in counts 4 and 5, the alleged victim was Doe 2.

Defense counsel requested CALCRIM No. 3500. The standard form version of this instruction is intended to be given in connection with a single count, as follows:

"The defendant is charged with _____ <*insert description of alleged offense*> [in Count ___] [sometime during the period of _____ to _____].

"The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

The version of this instruction that the trial court ultimately gave, however, applied to counts 1 through 5 collectively, as follows: "The defendant is charged with Rape, Counts I-V[,] sometime during the period of 2004 to 2007. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." (CALCRIM No. 3500.)

It is not clear who drafted this wording. However, it does appear that defense counsel knew about it in advance and did not object to it.

B. *Analysis.*

Preliminarily, the People argue that defense counsel forfeited this contention, either by requesting the challenged instruction or by failing to object to it below. However, while defense counsel did request CALCRIM No. 3500 by number, there is no indication that he requested the particular language that defendant is now challenging.[11] Defendant did not have to object to this language below in order to argue on appeal that it

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[11] In discussing a different unanimity instruction — CALCRIM No. 3502, to be given only if the prosecution has made an election as to which count is based on which acts— defense counsel appeared to agree that the evidence showed only three instances of rape of Doe 1 and two instances of rape of Doe 2. However, he never agreed that the trial court was not required to give a unanimity instruction at all. Moreover, there is no indication that his agreement at this point somehow invited the wording of the unanimity instruction that the trial court ultimately gave.

violated his substantial rights. (Pen. Code, § 1259; *People v. Lindberg* (2008) 45 Cal.4th 1, 34, fn. 11.) Accordingly, we turn to the merits.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Here, defendant was charged with three counts involving rape of Doe 1, yet the evidence showed as many as six rapes of Doe 1. Similarly, he was charged with two counts involving rape of Doe 2, yet the evidence showed at least three such rapes, and Doe 2 testified that he did "the same thing" on other occasions. The prosecutor never plainly communicated to the jury an election as to which count was based on which incident. Accordingly, the trial court was required to give a unanimity instruction sua sponte.

Defendant argues that the instruction as given was erroneous "because it told the jury it only needed to conduct a unanimity analysis once instead of five times for each of the five separate counts." "'[T]he question is whether there is a "reasonable likelihood" that the jury understood the charge as the defendant asserts.' [Citation.]" (*People v. Bland* (2002) 28 Cal.4th 313, 332.)

The instruction was at least ambiguous as to whether the jury had to agree on one act of rape per count, rather than one act of rape for purposes of the entire case. But only one of these interpretations makes any sense; the other is absurd. Reasonable jurors would readily understand why they are required to agree on the factual basis for each count. But what would they to make of a requirement that, as long as they agree on the factual basis for any one rape, they are free to disagree on the other four? Especially when there are two different victims? We simply cannot believe that reasonable jurors would ascribe such a wrong-headed meaning to the instruction.[12]

We therefore conclude that the trial court's unanimity instruction was not erroneous.

IV

MISCELLANEOUS FINES

Defendant challenges three fines and one order for payment of costs that the trial court imposed.

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[12] *People v. Mitchell* (2008) 164 Cal.App.4th 442 rejected a similar challenge to a unanimity instruction. There, however, the court relied, in part, on the fact that CALCRIM No. 3515, which required the jurors to consider each count separately, was also given. (*Mitchell*, at p. 465.) Here, by contrast, CALCRIM No. 3515 was not given. The court also relied on the fact that the unanimity wording came as part of the instruction defining a single instance of the substantive offense. (*Mitchell*, at p. 465.) Again, that was not true here. Accordingly, *Mitchell* is not controlling one way or the other.

A. *Restitution Fine under Penal Code Section 1202.4.*

First, the trial court imposed a $50,000 restitution fine, purportedly pursuant to Penal Code section 1202.4. It also imposed a $50,000 parole revocation restitution fine pursuant to Penal Code section 1202.45. Defendant contends that the first of these two fines was error because the amount of the fine exceeded the statutory maximum.[13]

As the People concede, defendant is correct.

Penal Code section 1202.4, subdivision (b), as relevant here, provides: "*In every case* where a person is convicted of a crime, the court shall impose a separate and additional restitution fine . . . .

"(1) The restitution fine . . . shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony . . . .

"(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, *multiplied by the number of felony counts of which the defendant is convicted*." (Italics added.)

Thus, as a matter of statutory interpretation, "'[t]he maximum [restitution] fine that may be imposed in a criminal prosecution is $10,000 "regardless of the number of victims or counts involved." [Citation.]' [Citations.]" (*People v. Blackburn* (1999) 72

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[13] Defendant does not contend that this or any of the other challenged fines or cost orders violated his right to trial by jury. (See *People v. Amor* (1974) 12 Cal.3d 20, 30-31; but see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) We deem any such contention forfeited for purposes of this appeal.

Cal.App.4th 1520, 1534 [Fourth Dist., Div. Two]; see also Pen. Code, § 1202.4, subd. (b)(1).)

Plainly, the trial court intended to impose the maximum allowable restitution fine. Accordingly, in our disposition, we will modify the amount of this fine to $10,000. (See *People v. Blackburn*, *supra*, 72 Cal.App.4th at p. 1534.)

In his opening brief, defendant did not expressly challenge the $50,000 parole revocation restitution fine imposed under Penal Code section 1202.45. However, as the People concede, the amount of this fine must be the identical to the amount of any restitution fine imposed under Penal Code section 1202.4. Accordingly, we will also modify the amount of the parole restitution revocation fine to $10,000.

B. *Child Abuse Prevention Fine under Penal Code Section 294, Subdivision (b).*

Second, the trial court imposed a $25,000 child abuse prevention fine, purportedly pursuant to Penal Code section 294, subdivision (b). Defendant contends that this was error because (1) the trial court made no finding of ability to pay, (2) there was insufficient evidence to support a finding of ability to pay, and (3) the amount of the fine exceeded the statutory maximum.

Penal Code section 294, subdivision (b), as relevant here, provides: "Upon conviction of any person for a violation of Section 261,[**14**] 264.1, 285, 286, 288a, or 289

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14 Defendant does not contend that this fine was inapplicable on the ground that he was convicted of aggravated sexual assault on a child involving rape, under Penal

[footnote continued on next page]

where the violation is with a minor under the age of 14 years, the court may, in addition to any other penalty or restitution fine imposed, order the defendant to pay a restitution fine based on the defendant's ability to pay not to exceed five thousand dollars ($5,000), upon a felony conviction . . . to be deposited in the Restitution Fund to be transferred to the county children's trust fund for the purpose of child abuse prevention."

The very imposition of this fine implies a finding of the ability to pay it. Nothing in this statute requires the trial court to make an express finding of ability to pay. Hence, the implied finding is sufficient. (See *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1377 [former Gov. Code, § 13967, subd. (a)].)

"Moreover, because the appropriateness of a restitution fine is fact-specific, as a matter of fairness to the People, a defendant should not be permitted to contest for the first time on appeal the sufficiency of the record to support his ability to pay the fine. Otherwise, the People would be deprived of the opportunity to cure the defect by presenting additional information to the trial court to support a finding that defendant has the ability to pay. [Citations.] A challenge to the sufficiency of evidence to support the imposition of a restitution fine to which defendant did not object is not akin to a challenge to the sufficiency of evidence to support a conviction, to which defendant necessarily objected by entering a plea of not guilty and contesting the issue at trial." (*People v.*

[footnote continued from previous page]
Code section 269, subdivision (a)(1), rather than of rape per se, under Penal Code section 261. (But see *People v. Jimenez* (2000) 80 Cal.App.4th 286, 290-292.) Thus, he has forfeited any such contention.

Gibson (1994) 27 Cal.App.4th 1466, 1468-1469; accord, *People v. Forshay* (1995) 39 Cal.App.4th 686, 689-690.)

Finally, as to the amount of the fine, defendant simply assumes, without analysis, that the statutory maximum of $5,000 applied on a per-case basis, not a per-count basis. As we held in part IV.A, *ante*, this is true with respect to a restitution fine under Penal Code section 1202.4. However, that is because that statute prescribes a fine of up to $10,000 "[i]n every *case* where a person is convicted of a crime . . . ." (Pen. Code, § 1202.4, subd. (b), italics added.) By contrast, Penal Code section 294, subdivision (b) prescribes a fine of up to $5,000 "[u]pon conviction . . . for a *violation* of" any specified statute. (Italics added.) Here, defendant was convicted of five statutory violations. Accordingly, he is subject to five fines of up to $5,000 each.

We therefore conclude that the trial court properly imposed a $25,000 child abuse prevention fine under Penal Code section 294, subdivision (b).

C. *Sexual Offender Fine under Penal Code Section 290.3, Subdivision (a).*

Third, the trial court imposed a $300 sexual offender fine, purportedly pursuant to Penal Code section 290.3, subdivision (a). Defendant contends that this was error because there was insufficient evidence of ability to pay. Alternatively, he contends that his trial counsel rendered ineffective assistance by failing to raise this issue below.

Penal Code section 290.3, subdivision (a), as relevant here, provides that every person convicted of a specified sexual offense, including aggravated sexual assault on a child (see Pen. Code, § 290, subd. (c)), "shall, in addition to any imprisonment or fine, or

both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction, *unless the court determines that the defendant does not have the ability to pay the fine*." (Italics added.)

In light of the language italicized above, it is the defendant who has the burden of proving inability to pay this fine.[15] (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1371; *People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750.) A claim of inability to pay this fine is forfeited if not raised below. (*McMahan*, at pp. 749-750.)

Here, defense counsel did not assert inability to pay. Thus, he forfeited defendant's present claim. Defendant contends that this constituted ineffective assistance of counsel. For him to prevail on this contention, however, the record would have to demonstrate, among other things, that there could be no satisfactory explanation for defense counsel's challenged action. (*People v. Salcido* (2008) 44 Cal.4th 93, 170, 172.) For all we know, if defense counsel had raised the issue, the People would have been able to introduce ample evidence of defendant's ability to pay.

We therefore conclude that defendant has not shown any error in imposing the sexual offender fine under Penal Code section 290.3, subdivision (a).

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[15] Defendant does not contend that this allocation of the burden of proof is unconstitutional. We express no opinion on any such contention.

D. *Costs of the Probation Report under Penal Code Section 1203.1b, Subdivision (a).*

Fourth, and finally, the trial court required defendant to pay up to $318 toward the cost of the probation report, purportedly pursuant to Penal Code section 1203.1b, subdivision (a). Defendant contends that this was error because there was insufficient evidence of ability to pay. Again, he also contends, alternatively, that his trial counsel rendered ineffective assistance by failing to raise this issue below.

Penal Code section 1203.1b, subdivision (a), as relevant here, provides: "In any case in which a defendant is convicted of an offense and is the subject of any . . . presentence investigation and report, . . . the probation officer . . . , taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost . . . of conducting any presentence investigation and preparing any presentence report . . . . The probation officer . . . shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that *the defendant is entitled to a hearing*, that includes the right to counsel, *in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver*." (Italics added.)

The People concede that defendant is entitled to a remand for the limited purpose of determining his ability to pay the cost of the probation report. Rather than examine the issue independently, we accept the People's concession. In our disposition, we will order such a limited remand.

V

DISPOSITION

The judgment is modified so as to reduce both the restitution fine under Penal Code section 1202.4 and the parole revocation restitution fine under Penal Code section 1202.45 from $50,000 to $10,000. The portion of the judgment that orders defendant to pay up to $318 toward the cost of the probation report under Penal Code section 1203.1b, subdivision (a) is reversed, and the matter is remanded with directions to reconsider whether defendant should pay any costs under Penal Code section 1203.1b, subdivision (a), and if so, in what amount. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

We concur:

GAUT
J.

MILLER
J.